TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 207.

THE UNION REFRIGERATOR TRANSIT COMPANY, PLAINTIFF IN ERROR,

vs.

STEPHEN H. LYNCH, TREASURER OF SALT LAKE COUNTY AND COLLECTOR OF TAXES THEREIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED FEBRUARY 16, 1899.

(17,293.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 29, 1899.

1 District Court, Third Judicial District, State of Utah, County of Salt Lake.

THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff,
v.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes Therein, Defendant.

The plaintiff complains of the above-named defendant and alleges—

That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

That its principal office and place of business is in the city of Louisville, in said State, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States and of soliciting shipments for such cars and giving to the said cars needful attention at various points in transit; that the said cars are and were during the said times the sole property of the plaintiff and are not and were not during any of the said time allotted, leased, rented, or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were

2 they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are and were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them in shipping.

The plaintiff further alleges that the business in which said cars, including the cars hereinbefore mentioned, are and were during the said times engaged in was exclusively interstate-commerce business, being confined to interchange and transportation of perishable products of the various parts of the United States from points in some of said States to points in others of the said States; that plaintiff has not now and has not had any office or place of business within the State of Utah, and that all freight transported in plaintiff's cars in or through the State of Utah, including the cars hereinafter mentioned, was transported in said cars either from a point or points in a State of the United States outside of the State of Utah to a point or points within the State of Utah or from a point or points within the State of Utah to a point or points without the State of Utah, or between points neither of which were within the said State of Utah, and that said cars were within said State of Utah at no regular intervals nor in any regular number, and when in said State of Utah were only within it in transit, except to load or unload freight shipped from within out of said State or coming into said State from without the same or in the transportation of freight entirely through or

across said State, and at such times the said cars were only transiently present for the said purposes and not otherwise.

And plaintiff further alleges that said cars do not and did not abide, nor have they at any time had any situs within the said State of Utah, nor has this plaintiff, nor has it heretofore at any time had other property of any description whatsoever located
3 within the State of Utah.

And plaintiff alleges that its cars so used as hereinbefore stated, and not otherwise, are not subject to tax within the said State for any purpose whatsoever.

That, notwithstanding the aforosaid facts, the State board of equalization of the State of Utah unlawfully and wrongfully on the 14th day of August, 1897, assessed and valued, of the property of the plaintiff, ten cars of the aggregate assessment of $2,600 for all purposes of county and State taxation for the year 1897, and thereafter wrongfully and unlawfully apportioned the said assessment to the several counties in the said State of Utah through which lines of railway pass and over which the said cars might pass or be transported; that among the counties to which said apportionment was made was the county of Salt Lake, and there was by the said board apportioned to said county of Salt Lake of the said assessment the sum of $210.00.

That the taxes levied upon the said property so assessed and apportioned to Salt Lake county for State, State school, county, city, and city school taxes amounted to the sum of $5.76; that the said tax was and is by reason of the aforesaid facts illegal and void.

That the plaintiff, to avoid the seizure and sale of its property and to prevent incurring the penalties provided by law, did on the 18th day of November, 1897, pay the said tax under protest to the said defendant, who was then and still is the duly elected, qualified, and acting treasurer of said Salt Lake county, and, by virtue of the said office, the duly authorized and legally constituted collector of all of the said taxes.

That at the time of the payment of the said sum of money so demanded for said tax the plaintiff duly notified the said defendant, as such collector, of the grounds of its claim that the said
4 tax was illegal; that the same was for that reason paid under protest, and that suit would be brought against him to recover the same; that the said protest was made in writing and before the payment of the said sum of money. A copy of the said protest so made and delivered to said defendant at said time is hereto attached, marked Exhibit "A," and made a part of this complaint.

Wherefore the said plaintiff prays judgment against the said defendant, as such treasurer and collector, for the said sum of $5.76 and interest thereon, as provided by law, and also for its costs herein.

P. L. WILLIAMS,
Attorney for Plaintiff.

STATE OF UTAH, } ss:
County of Salt Lake, }

P. L. Williams, being duly sworn, deposes and says that he is the attorney for the said plaintiff and makes this verification on its behalf and for the reason that the said plaintiff and all its officers are non-residents of and absent from the said State; that said attorney is familiar with the facts alleged in said complaint from documentary and other evidence in his possession relating thereto; that he has read the foregoing complaint, knows the contents thereof, and same is true of his own knowledge.

P. L. WILLIAMS.

Subscribed and sworn to this 18th day of November, 1897.

CHAS. D. SAVERY,
Notary Public.

[SEAL.]

5 EXHIBIT "A."

SALT LAKE CITY, UTAH, *November* 18, 1897.

Stephen H. Lynch, county treasurer, Salt Lake county, and collector of taxes.

SIR: You are hereby notified that the State board of equalization of the State of Utah assessed for taxation in said State for the year 1897 ten cars of the Union Refrigerator Transit Company, a corporation of the State of Kentucky; that the said ten cars were assessed at $260.00 each, making a total assessment in the aggregate of the cars of said company within the State of Utah of $2,600.00, and that the said board apportioned the said assessment of $2,600 on said cars among the several counties in said State through which the lines of railway pass, over which it is claimed said cars of said refrigerator company were used during said year; that in and by such apportionment the said board of equalization of said State apportioned to Salt Lake county of said total assessment on said cars of said company the sum of $210.00, and that the tax levied on said assessment for said State, State school, county, city, and city school taxes in said Salt Lake City and county aggregate the sum of $5.76.

You are further notified that the said board of equalization of said State made the said assessment and apportionment against said property without authority of law, and that the same is illegal and void on the ground that said company, the owner of said cars, is a non-resident of the State of Utah, has no office or place of business within the State; that its business is owning and letting refrigerator cars to shippers for the transportation of perishable merchandise in interstate commerce only; that its cars never come into the State of Utah except at irregular intervals and carrying such interstate commerce and freight, and for no other purpose than for the transportation of such freight, and the cars are
6 only in the State in transit and have no actual or other situs within the said State, and are not subject to taxation by law within said State.

That the whole of the said taxes so assessed and levied upon the property of the said company within said city and county are by reason of the facts aforesaid illegal and void, and the said company now protests against the payment of the said sum on the ground that the same is illegal and void, and it submits to pay the same only to prevent the seizure and sale of its property and to avoid being subjected to the penalties provided by law; and you are hereby notified that said railroad company will bring suit against you to recover the said sum of $5.76, so illegally levied as a tax upon its said property and paid, together with interest thereon and the costs of suit.

UNION REFRIGERATOR COMPANY,
By P. L. WILLIAMS,
Its Attorney and Agent.

Endorsed: Complaint. Filed Nov. 19, 1897. David C. Dunbar, clerk, by F. W. Little, deputy.

7 In the District Court of the Third Judicial District of the State of Utah, Salt Lake County.

UNION REFRIGERATOR AND TRANSIT CO., Plaintiff,
v.
S. H. LYNCH, Collector, etc., Defendant.

Now comes the said defendant and demurs to the complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action.

WALDEMAR VAN COTT,
GRAHAM F. PUTNAM,
RAY VAN COTT,
Attorneys for Defendant.

Service of above accepted this 26th day of November, 1897.
P. L. WILLIAMS,
Attorney for Plaintiff.

Endorsed: Demurrer. Filed Nov. 26, 1897. David C. Dunbar, clerk, by F. W. Little, deputy.

8 In the Third Judicial District Court of the State of Utah, County of Salt Lake.

THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff,
v.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes Therein, Defendant.

This cause having been heretofore argued as to the sufficiency of the complaint on the demurrer interposed thereto by the defendant and the same having been duly considered, now, on this date, it is

ordered, adjudged, and decreed that the demurrer of the defendant to the said complaint be, and the same is hereby, sustained, and the said plaintiff electing in open court not to amend and further electing to stand on its complaint, it is further ordered, adjudged, and decreed that the said complaint be, and the same is hereby, dismissed with costs to the defendant.

Done in open court this 21st day of May, 1898.

[SEAL.] A. N. CHERRY, *Judge.*

Attest: DAVID C. DUNBAR, *Clerk,*
By M. M. LIGGAN, *Deputy.*

Endorsed: Order. Filed May 23, 1898. David C. Dunbar, clerk, by F. W. Little, clerk.

9 In the District Court in and for Salt Lake County, State of Utah.

THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff,
v.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes Therein, Defendant.

Judgment by the Court.

This cause coming on for hearing upon the demurrer to the complaint filed herein, Mr. P. L. Williams appearing as attorney for the plaintiff and Mr. Waldemar Van Cott appearing as attorney for the defendant, whereupon the said demurrer to the complaint is argued to the court by the attorneys for the respective parties and submitted to the court for consideration and decision, and the court, having duly considered the said demurrer, sustains the said demurrer; whereupon, the plaintiff electing to stand upon its complaint and not electing to amend, the court orders that said case and suit be dismissed at plaintiff's costs; whereupon the court delivers its findings and decision and orders that judgment be entered in accordance therewith.

Wherefore, by virtue of the law and the findings aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover of and from said defendant nothing by its said complaint herein, and that the same be, and is hereby, dismissed; and it is further ordered that said defendant have and recover of and from
10 said plaintiff its costs and disbursements in this behalf expended and taxed at the sum of $—.

Judgment rendered May 21st, 1898.

Endorsed: Judgment by the court. Filed May 24th, 1898. David C. Dunbar, clerk, by F. W. Little, deputy.

11 In the District Court, Third Judicial District, State of Utah, County of Salt Lake.

UNION REFRIGERATOR TRANSIT COMPANY, Plaintiff,
v.
S. H. LYNCH, Collector, etc., Defendant.

Notice of Appeal.

To S. H. Lynch, collector, etc., and to his attorneys, Waldemar Van Cott, Graham F. Putnam, and Ray Van Cott:

Take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of Utah from the judgment rendered and entered in said district court on the 21st day of May, 1898, in favor of the said defendant and against the said plaintiff and from the whole thereof.

Dated June 13, 1898.

P. L. WILLIAMS,
Attorney for Plaintiff.

12 In the District Court in and for Salt Lake County and State of Utah.

UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff,
v.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes Therein.

I, David C. Dunbar, clerk of the district court in and for Salt Lake county, State of Utah, do hereby certify that the above and foregoing transcript in the case of The Union Refrigerator Transit Company, a corporation, *v.* Stephen H. Lynch, etc., contains all the original papers filed in said cause in this court, including the original order as made by the court sustaining the demurrer to the complaint and the notice of appeal, constituting the judgment-roll thereof.

And I further certify that an undertaking on appeal in due form has been properly filed, and that the same was filed on June 16, 1898.

And I further certify that the above and foregoing transcript is by me transmitted to the supreme court of the State of Utah, pursuant to such appeal.

Attest my hand and seal of said court, at Salt Lake City, Utah, this 18th day of August, A. D. 1898.

DAVID C. DUNBAR, *Clerk*,
[SEAL.] By M. M. LIGGAN, *Deputy*.

Endorsed: Filed Aug. 27, 1898. Lilburn P. Palmer, clerk supreme court.

13 In the Supreme Court of the State of Utah, Regular September Term.

SEPTEMBER 19, 1898.

THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Appellant,
v.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes, Respondent.

This cause, coming on regularly to be heard, was argued by Mr. P. L. Williams in behalf of the appellant, by Mr. Waldemar Van Cott in reply, was submitted, and by the court taken under advisement.

Title of Court and Cause.

DECEMBER 10, 1898.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the lower court be, and the same is hereby, affirmed with costs.

14 In the Supreme Court of the State of Utah.

THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Appellant,
v.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes, Respondent.

This action was brought by the Union Refrigerator Transit Company against the collector of taxes for Salt Lake county to recover a certain sum of money paid him as tax under protest, the company claiming that the tax was illegal. It was alleged in the complaint that the plaintiff is a corporation organized under the laws of the State of Kentucky, having its principal office and place of business in the city of Louisville, in that State, and engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over various lines of railroad throughout the United States; that its cars have not been, during any of the time which it has been engaged in business, let, leased, run, or furnished under contract with any railroad company or carrier of freight or run on any particular lines of railroad or confined to any particular routes or trains or at any specified or agreed times, but have been run indiscriminately over the lines of railroad which the consignors of freight shipped in them chose to route them in
15 shipping; that the business in which the cars were engaged was exclusively interstate commerce; that the plaintiff has not and has not had at any time an office or place of business within the State of Utah; that all the freight transported in the cars into and through this State was transported from points in another State

within the United States to points within this State, or *vice versa*, or between points none of which were within the State of Utah, the cars merely passing through this State; that the cars were within this State at no regular intervals and in no regular number and, when within this State, were only within it in transit, except to load and unload freight shipped from within out of the State or coming into the State from places without the same or in the transportation of freight entirely through or across it; that at all such times said cars were only transiently present for the said purposes, having no time had a situs within this State; that the plaintiff has not at any time had other property of any description located within the State of Utah; that, notwithstanding these facts, the board of equalization of the State of Utah for the year 1897 assessed and valued ten cars, the property of the plaintiff, for taxation, the aggregate assessment thereof being $2,600.00, and also apportioned said assessment between the several counties in this State through which the lines of railroad pass and through which the cars might be transported; that the board apportioned to Salt Lake county of the said aggregate assessment the sum of $210.00; that taxes were levied upon the assessed valuation of the property so apportioned to said Salt Lake county aggregating $5.76; that said tax is illegal and void; that, to avoid the seizure and sale of its property and to prevent incurring the penalties provided by law, the plaintiff, on the 18th day of November, 1897, paid said taxes under pro-
16 test to defendant as treasurer of said county and collector of taxes, and that at the time of payment notice was given defendant of the plaintiff's claim that the taxes were illegal, and that suit would be brought to recover the same.

To this complaint a general demurrer was interposed, which, upon hearing, was sustained by the court, and the plaintiff electing to stand upon its complaint and refusing to amend, the action was dismissed. This appeal is from the judgment of dismissal.

After stating the case, BARTCH, J., delivered the opinion of the court:

The appellant has challenged the power of the State to levy and collect the tax in question, in the first instance, upon the ground that the cars, being only transiently within the State from time to time, acquired no such situs within its borders as to give it jurisdiction over them for the purposes of taxation.

The power to tax is founded in necessity. It is an incident of sovereignty possessed by the Government, even though not expressly conferred by the people. A tax is a contribution imposed by the Government upon the people for the service of the State. In return for such contribution the State affords protection to life, liberty, and property, and this is essential to civilization and the very existence of the State. The assessment and collection of taxes, therefore, are among the highest acts of the supreme power of the Government. The power of taxation is a legislative power, and no principle of law is better settled than that such power extends to all property, whether real or personal, tangible or intangible, within the borders

of the State, not exempt under the Constitution and laws of the United States, and, except so far as the comity of the State
17 permits, such property for the purposes of taxation is not affected by the laws of any other State. Therefore, in order that property may be subjected to taxation, it is not a requisite that the owner should reside in the State, and this is true as to personal property, tangible or intangible, as well as to real. Regardless of where the owner's domicil may be, it is the duty of the State to furnish protection to his property, and in turn the property must bear a just proportion of the burdens of the Government. The ancient rule indicated by the maxim *mobilia sequuntur personam*, that personal property is to be regarded as subject to the *lex domicilii*, has never been of universal application in this country, and in modern times has seldom interfered with the power to levy taxes upon such property. The origin of that doctrine dates from an ancient time when jewels and gold principally constituted the movable property, and that could be taken by the owner from one place to another, but such has not been the case in recent times, since in the continued progress of the world the accumulated wealth consists in large proportions of personal property, including not only jewels and gold, but also a great variety of other personal property, much of which is intangible, as franchises, privileges, etc., but nevertheless property representing value, and none of which is immediately connected with the person of the owner, yet over all of which it is incumbent upon Government to extend its protection. The constantly increasing variety of such property, perceptible and imperceptible, tangible and intangible, has caused the ancient rule expressed in the maxim to yield more and more to the *lex situs*, and while it is true that for many purposes personal property is subject to the law of the place of the owner's domicil, still the law is well settled that for the purposes of taxation and for other purposes such property has its actual situs where it has been brought and
18 used by its owner and is subject to the law of that place. Hence, if the owner reside in one State and his movables are taken to another and used there, they may become the subject of taxation in the latter State. Such property may be separated from its owner, and he may be taxed, because of it, at the place where it is found, although not the place of his domicil.

In his Commentaries on the Conflict of Laws, sec. 550, Mr. Justice Story, discussing jurisdiction as regards property, observed that "Although movables are for many purposes to be deemed to have no situs, except that of the domicil of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

Pullman's Car Co. *v.* Pennsylvania, 141 U. S., 18.

The power to tax being inherent in the Government, the State unquestionably has the right through the legislature to exercise that power over all property which may be found within its borders, whether brought there temporarily or otherwise, for the purpose of business or for trade or convenience, unless restrained or limited by constitutional provision, and courts cannot control the exercise of such power except when it conflicts with constitutional limitations.

In M'Culloch *v.* State of Maryland, 4 Wheat., 316, 429, Mr. Chief Justice Marshall, delivering the opinion of the court, after defining the nature and extent of the original right of taxation which remains with the States, said: "It may be objected to this definition that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within
19 its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission."

So in Transportation Co. *v.* Wheeling, 99 U. S., 273, Mr. Justice Clifford, delivering the opinion of the court, after citing authorities to the proposition that the power to tax for the support of the State government exists in the State independently of the national Government, and that it may well be assumed that where there is no cession of contradictory or inconsistent jurisdiction in the United States nor any restraining compact in the Constitution the power in the States to tax for the support of the State authority reaches all the property within the State which is not properly regarded as the instruments or means of the Federal Government, observed: "Beyond question these authorities show that all subjects over which the sovereign power of a State extends are objects of taxation, the rule being that the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal Government, whose laws, made in pursuance of the Constitution, are supreme."

From the foregoing considerations it is clear that the power of this State to tax the personal property in question herein is not affected by the fact that the Union Refrigerator Transit Company is
20 a creature of another State in which it has its domicil, nor because of the fact that the cars were only transiently in this State or were furnished for transportation of perishable freight over various lines of railroad throughout the United States. It is therefore evident that this State has power to tax such cars when brought within its territory or jurisdiction and are found there, but whether by apt legislation it has exercised its authority in this case is a question to be hereafter determined.

Counsel for the appellant has cited numerous cases to support the contention respecting the question of situs above considered.

Crandall *v.* State of Nevada, 6 Wall., 35, the first case cited, was one where a statute providing for the levy of a "tax of one dollar upon every person leaving the State by railroad, stage coach, or other vehicle" engaged in the business of transporting passengers was held unconstitutional and void.

Moore *v.* Wilkins, 10 N. H., 452, simply decides that an individual is to be taxed in the place where he is residing, and not in another town where he has gone for a temporary purpose only, both places being in the same State.

So, in Robinson *v.* Longley, 18 Nev., 71, it was held that a traveling circus and menagerie owned by a non-resident and brought into the State to be exhibited at various places and then taken into and through other States for the same purpose was not subject to taxation in the State of Nevada.

M'Colloch *v.* Maryland, 4 Wheat., 316, was a case where a tax imposed by the State of Maryland on a branch of a bank of the United States located in that State was held unconstitutional, but clearly that case does not militate against the principles here-
21 inbefore considered, the tax imposed being on property over which the United States had jurisdiction.

In the case of the State Freight Tax, 15 Wall., 232, it was held that the statute of a State imposing a tax upon freight taken up within the State and carried out of it or taken up without the State and brought within it is repugnant to the Constitution of the United States, a tax upon freight transported from State to State being a regulation of commerce among the States.

In Coe *v.* Errol, 116 U. S., 517, it was decided that goods on their way through a State from a place outside thereof to another place outside thereof are subjects of interstate or foreign commerce and are not taxable by the State through which they pass.

In Conn. River L. Co. *v.* Columbia, 62 N. H., 286, it was held that logs temporarily in a river awaiting transportation from one State to another were exempt from State taxation.

Pullman Southern Car Co. *v.* Nolan, 22 Fed., 276, is a case where the State of Tennessee attempted by statute to impose a "privilege tax" on sleeping cars in the transportation of interstate passengers, and the court held that the cars had no situs in that State for such purpose. This was not a tax based on value, but was an arbitrary fixed charge on the business without regard to the articles employed.

Likewise as to Pickard *v.* Pullman Southern Co., 117 U. S., 34, which holds the same act of Tennessee void so far as it applies to the interstate transportation of passengers.

Reliance is also placed by the appellant, to sustain the proposition that the cars in question had no situs in this State for the purpose of taxation, upon Morgan *v.* Parham, 16 Wall., 471; Hayes *v.* Pacific Mail Steamship Co., 17 How., 596, and St. Louis *v.* The Ferry Co., 11 Wall., 423, but those are cases where ships or vessels were

engaged in interstate or foreign commerce upon the high
22 seas and were registered at their home ports under the laws of the United States at the owner's domicil, and were therefore held not to be subjects of taxation in another State at whose ports they temporarily touched for the purpose of delivering or receiving passengers or freight. The distinction between ships and vessels having their situs fixed by Congress, sailing on the high seas, only temporarily and incidentally touching ports, and cars and other vehicles not having their situs so fixed and used for transportation on land only, is marked and obvious.

Mr. Justice Bradley, in Railroad Co. *v.* Maryland, 21 Wall., 456, speaking of transportation on land and water, observed: "Commerce on land between the different States is so strikingly dissimilar in many respects from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal Governments. No doubt, commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and commerce. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National Legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible; but it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads
23 and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except where the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control."

So it will be noticed upon examination that the case at bar may be distinguished from each of the cases cited by the appellant on the question of situs and thus far considered. Each one presented different facts and different questions, and none of them can be regarded as authority here.

There have been cited, however, on this same point the cases of The Central R. R. Co. *v.* State Board of Assessors, 49 N. J. L., 1, and Bain *v.* Railroad, 105 N. C., 363, and these, it must be admitted, support the contention of the appellant, and some of the case above distinguished are therein cited as authority. We do not think those decisions are in harmony with the weight of authority, and they are clearly opposed to the latest decisions of the Supreme Court of the United States upon this subject, as appears from the cases of The Pullman's Car Co. *v.* Pennsylvania, 141 U. S., 18; Adams Express Co. *v.* Ohio, 165 U. S., 194, and Adams Express Co. *v.* Ohio, 166 U. S., 185.

We conclude that the cars in question had, for the purposes of taxation, a situs in this State.

Nor do we think the tax imposed is a regulation of interstate commerce. It is not a tax on persons or freight in transit through this State to other States or countries nor on the right of transit or transportation, nor is it a license or privilege tax or tax on business or occupation or on property of the United States located in this State. It is essentially a tax on property found and used in this State and valued for the purpose of taxation like other personal property within the jurisdiction of the State, and, although
24 the cars may have been employed in interstate commerce, the State is not prohibited by the Constitution or laws of the United States from taxing them as other personal property within its jurisdiction. This has been so declared by the Supreme Court of the United States.

In Pullman's Car Co. *v.* Pennsylvania, *supra*, where the question was whether Pullman cars could be taxed in Pennsylvania, the corporation being a creature of the State of Illinois, having its home there, itself not operating any railroad, but merely furnishing cars to the various railroad lines, which cars were simply run into Pennsylvania and out again in the ordinary course of business, Mr. Justice Gray, delivering the opinion of the court, after stating that for the purposes of taxation it had been repeatedly affirmed by that court that personal property might be separated from its owner, and that he might be taxed on its account at the place where he was, although not in the place of his own domicil, and even if he were not a resident of the State imposing the tax, said: "It is equally well settled that there is nothing in the Constitution which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

Again he observed: "The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so employed does not exempt them from taxation by the State, and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro from certain routes of travel. If they had never passed beyond the limits of Pennsylvania it could not be
25 doubted that the State could tax them like other property within its borders notwithstanding they were employed in interstate commerce. The fact that instead of stopping at the State boundary they cross that boundary in going out and coming back cannot affect the power of the State to levy a tax upon them. The State, having the right for the purposes of taxation to tax any personal property found within its jurisdiction without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain in the State, but the company has at all times

substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property."

In Adams Express Co. *v.* Ohio, 165 U. S., 194, Mr. Chief Justice Fuller, speaking for the court, said: "Although the transportation of the subjects of interstate commerce or the receipts received therefrom or the occupation or business of carrying it on cannot be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government."

So in Adams Express Co. *v.* Ohio, 166 U. S., 185, Mr. Justice Brewer, delivering the opinion of the court on rehearing, said:

"Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax by whatever name called, which is in effect a tax for the privilege of transacting such commerce; and it has as often affirmed that such restriction upon the power of a State to interfere with interstate commerce does not in the least degree abridge the right of a State to tax at their full value all the instrumentalities used for such commerce."

Postal Telegraph Cable Co. *v.* Adams, 155 U. S., 688.
Mayre *v.* B. & O. Railroad, 127 U. S., 117.
Western Union Tel. Co. *v.* Massachusetts, 125 U. S., 530.
26 Maine *v.* Grand Trunk R'y Co., 142 U. S., 217.
Massachusetts *v.* Western Union Tel. Co., 141 U. S., 40.

We come now to the remaining question, whether there are any provisions of law which authorize a tax upon such property when found within the jurisdiction of the State.

The appellant, it seems, contends that our laws respecting taxation were only intended to apply to car lines or car companies owning and operating car lines within this State and to such property connected with such lines as abides and has its actual situs within the State, and that there is no language employed in any of the provisions of law which contemplates the taxation of cars belonging to an owner residing in a foreign State and used in interstate commerce, although, in such use, such cars may, for a portion of the time, be within the jurisdiction of this State.

In sec. 2, art. 13, of the State constitution it is provided: "All property in this State, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law." This is an express constitutional provision and is adequate to impose a tax upon all property which has a situs within the State for such purpose, ex-

cept property exempt under the laws of the United States or under the constitution of this State. It is therefore apparent that there is an apt provision in the fundamental law under which the appellant's cars could be taxed, they, as we have seen, having a situs in the State for such purpose and not falling within the exemption. Substantially the same provision is contained in sec. 1 of the act of the legislature approved April 5, 1896, Sess. Laws, p. 423, and what has been said respecting the constitutional provision above quoted, in the main, applies with equal force to that section of the
27 statute. The value of all property, however, for the purposes of taxation is "to be ascertained as provided by law." The manner of ascertaining the value being thus referred to the legislature, it, in the same act, sec. 55, Sess. Laws, 1896, provided: "The president, secretary, or managing agent, or such other officer as the State board of equalization may designate, of any corporation, and each person or association of persons owning or operating any railroad, street railway car, telegraph or telephone line or railway depot in this State, must, on or before the first Monday in March in each year, furnish the said board a statement signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday of March in each year, all the property, real, personal, or otherwise, owned by said corporation, person, or association of persons in the State, including a statement of mileage in each county as valued on the first Monday of March of the same year, and such other information as the board may require. Any officer of a railroad company, street railway, telegraph or telephone line, railway depot, or car company, failing on demand to furnish the statement required of him, shall be subject to the penalty provided in subdivision 2, sec. 18, of this act."

This section makes it incumbent upon certain officers of railway, car, telegraph, and telephone lines to furnish the State board of equalization statements of property as therein provided, and for failure to do so subjects them to certain penalties. These statements were doubtless intended as a convenience for the board in making the assessment, which is expressly provided for in section 56 as follows: "The State board of equalization must meet at the State capitol, or at such other place in the State as the board may determine, on the second Monday in July, and continue in open session from day to day, Sundays and legal holidays excepted, until
28 the third Monday in August, and later, if the business of the board requires it. At such meetings the board must assess all property and franchises of railroads, car, street railway, railway depot, telephone and telegraph companies, but franchises derived from the United States must not be assessed. All such property must be assessed in the name of the person, corporation or association owning, leasing, or using the same. Between the first and third Mondays of August, the board must apportion the total assessment of all property and franchises of such companies to the several counties in proportion to the value of such property in each county."

This section authorizes, as will be observed, the assessment by the

board of all the property referred to in the preceding section and declares that all such property shall be assessed in the "name of the person, corporation, or association owning, leasing, or using the same." The manifest intention of the legislature in the enactment of these provisions of statute was that all such property should be taxed, whether owned by a resident of this State or not, if the same was used within the State by the owner or by some person or corporation to whom the owner entrusted it for such use. Counsel for the appellant, however, called attention to the fact that in section 55 there is no punctuation between the words "street railway" and "cars," while the word "car" is punctuated by a comma in section 56, and insists that the real intention of the legislature was to treat the owners of car lines the same as owner- of railroads, street railways, telegraph or telephone lines, and that where it used the word "car" in each section it meant car lines or car companies having, owning, operating, and using such car lines within the State—in other words, that a car line means a physical line or a line
29 having a physical unity as the realty composing a line of railroad between definite places; that in order for the State to tax such property there must be a physical unity instead of a unity of use and management, as was the case in respect to the cars in question. We cannot assent to this contention. The question of punctuation cannot be allowed to control in the construction of these provisions of the statute, against, as we think, the manifest intent of the legislature. It would be a most fallible standard by which to construe them. In the interpretation of statutes the true meaning of the law-maker must be ascertained from the whole purview, and when that is manifest from a judicial inspection the court will not permit punctuation to change it. To ascertain the real intention and meaning of the statute, the court will punctuate or disregard punctuation as may be necessary. Punctuation may, when the meaning is uncertain, furnish some indication of it, and in such case may even decide what the meaning is, but when the intention of the legislature is apparent from a reading of the statute such intention must prevail, regardless of punctuation.

Suth. on Stat. Const., sec. 232.

In this case we think the statute should be read with a comma between the words "street railway" and "cars," and when so read the terms used mean "street railway line," "car line," etc., and "car line," in the sense employed in the several enactments, may mean a considerable number of cars operated by a car company as a car line without, as in the case at bar, the actual realty over which the rolling stock runs being owned by the owner of the cars. Evidently such line has a unity of use and management, and the several constitutional and statutory provisions are adequate to tax the cars when so employed and found within the jurisdiction of the State.

30 The same question here involved was, under similar legislation, before the supreme court of Colorado in Hall *v.* Re-

frigerator Transit Company, 24 Colo., 291, where Mr. Justice Goddard, delivering the opinion of the court, said:

"It is clearly manifest that the purpose of these constitutional and statutory provisions is to subject all property owned or used by a railway or other corporation within the territorial limits of the State to taxation according to its value, regardless of the domicil of its owner, and in so doing they exercise a well-recognized function of legislation."

Legislation which is claimed to grant immunity from taxation will be strictly interpreted against the exemption.

"In such cases the rule of strict construction applies, and, in order to relieve any species of property from its due and just proportion of the burdens of the government, the language relied on, as creating the exemption, should be so clear as not to admit of reasonable controversy about its meaning, for all doubts must be resolved against the exemption. The power to tax rests upon necessity, and is essential to the existence of the State."

Judge *v.* Spencer, 15 Utah, 242.
Suth. Stat. Const., sec. 364.

Counsel for the appellant has cited on this question Maryc *v.* Baltimore and Ohio Railroad, 127 U. S., 117, but that case cannot be regarded as controlling authority in this, because the legislation therein considered was entirely different from that considered herein, the same applying to domestic corporations only.

No point is made in this case concerning the apportionment of the tax among the several counties of the State.

We are of the opinion that the tax in question is lawful, and that the court properly dismissed the action.

The judgment is affirmed with costs.

We concur:
ZANE, *C. J.*
MINER, *J.*

31 Filed Jan. 20, 1899. Lilburn P. Palmer, clerk supreme court, Utah.

In the Supreme Court of the State of Utah.

THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff in Error,
vs.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes Therein, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Utah.

To the said court and the Hon. George W. Bartch, chief justice thereof:

And now comes the said The Union Refrigerator Transit Company, a corporation, by Percy Werner and Parley L. Williams, its

attorneys, and complains that in the record and proceedings, and also in the rendition of a judgment in a suit between The Union Refrigerator Transit Company, the appellant in the supreme court of the State of Utah, and Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, the respondent in said court, the same being the highest court of law and equity of the State in which a decision could be had in said suit, and in which a final judgment was rendered against the said The Union Refrigerator Transit Company on the 10th day of December, 1898, in said suit, wherein there was drawn in question by your petitioner an authority exercised under said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor
32 of the authority exercised under said State, and where a right, privilege, and immunity was claimed by your petitioner under the Constitution of the United States and the decision was against said right, privilege, and immunity, manifest error hath happened to the great damage of your petitioner.

Petitioner further alleges and shows that in said suit in the district court of the third judicial district of the State of Utah in and for Salt Lake county, wherein the said suit was originally instituted, the said The Union Refrigerator Transit Company, as plaintiff, brought its action against Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, as defendant, to recover back certain taxes levied upon property of said plaintiff which it, said plaintiff, claimed had been unlawfully and wrongfully and without authority of law assessed for taxation by the State board of equalization of the said State of Utah, which assessment was of the property mentioned in the complaint therein, your petitioner claiming that said property was in said State only temporarily in transit, engaged exclusively in interstate-commerce business, and that said property was only temporarily in said State in the transaction of said business and had no situs therein, and that said State had no jurisdiction over said property, and that the assessment of same by the State board of equalization and the taxation thereof was unauthorized and void and in violation of the provision of the United States Constitution vesting in the Congress of the United States the exclusive power to regulate commerce among the several States of the United States, to wit, of subdivision 3 of section VIII of article 1 of said Constitution, which said claim by your petitioner was denied by said district court of Salt Lake county on a demurrer to said complaint interposed by said de-
33 fendant and sustained by said district court, and the plaintiff electing to stand on its complaint and not electing to amend, the said court ordered and adjudged that said case and suit be dismissed at plaintiff's costs; which order and judgment were duly entered in said district court on the 21st day of May, 1898; and thereupon, and for the purpose of procuring a review of the said order and judgment by the supreme court of said State, the company, as plaintiff and appellant, perfected its appeal from said order and judgment of said district court to the said supreme court, and thereupon the record of said proceedings in the

said district court was filed in and said cause removed to the supreme court of the State of Utah, and the said supreme court heard said cause upon said record and the arguments of the respective parties thereto, in which court your petitioner duly claimed that the authority exercised by the State of Utah and the said State board of equalization were repugnant to the Constitution of the United States and the said provision thereof vesting in the Congress of the United States the exclusive power to regulate commerce among the States, and that your petitioner's property was exclusively engaged in interstate commerce and only temporarily present in said State in transit in said business, and had no situs in said State, and that said State of Utah had no jurisdiction over the same, and that your petitioner and said property were under said United States Constitution exempt from taxation by the authorities of the State of Utah, and petitioner alleges that a decision of said question was necessary to determine the rights of said parties; but said supreme court of the State of Utah rendered its decision on the 10th day of December, 1898, in favor of said authority, and entered its final decree and judgment herein, being the judgment first herein men-
34 tioned, holding that said authority so exercised by said State was not in violation of the Constitution of the United States or said provision thereof, and affirmed the said judgment of the said district court; all of which more fully appears by the records and proceedings herein, to which reference is hereby made, and in which said record and proceedings manifest error hath happened to the great damage of the said The Union Refrigerator Transit Company.

Wherefore it prays for the allowance of a writ of error and such other processes as may cause the same to be corrected by the Supreme Court of the United States.

PERCY WERNER AND
P. L. WILLIAMS,

Attorneys for The Union Refrigerator Transit Company, Petitioner, the said Plaintiff and Appellant in the Supreme Court of Utah.

I hereby certify that a Federal question was duly raised and decided in the foregoing case substantially as set forth in the foregoing petition, and the said writ of error from the Supreme Court of the United States is hereby allowed this 19th day of January, A. D. 1899, and the bond on said writ of error to be given in the sum of five hundred dollars.

G. W. BARTCH,
Chief Justice of the Supreme Court of the State of Utah.

35 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you or some of you, and you being the highest

court of law or equity of the said State in which a decision could be had in said cause between The Union Refrigerator Transit Company, a corporation, plaintiff in error and appellant, in said supreme court of the State of Utah, and Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, the defendant in error and respondent in said supreme court of the State of Utah, wherein was drawn in question by the said Union Refrigerator Transit Company, the plaintiff in error, an authority exercised under the said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of the authority exercised under said State, and where a right, privilege, and immunity was claimed by the said Union Refrigerator Transit Company, the plaintiff in error, under the Constitution of the United States, and the decision of said supreme court of said State was against said right, privilege, and immunity, manifest error hath happened, to the great damage of the said Union Refrigerator Transit Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you,
if judgment be therein given, that then, under your seal,
36 distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of March next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal Supreme Court, State of Utah, Jan. 4, 1899.]

LILBURN P. PALMER,
Clerk Supreme Court Utah.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District Utah.

Allowed by—
G. W. BARTCH,
Chief Justice of the Supreme Court of the State of Utah.

Filed Jan. 20, 1899.

LILBURN P. PALMER,
Clerk Supreme Court Utah.

37 UNITED STATES OF AMERICA, *ss:*

To Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, and to Waldemar Van Cott, Graham F. Putnam, and Ray Van Cott, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of March next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, wherein The Union Refrigerator Transit Company is plaintiff in error and you, Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable George W. Bartch, chief justice of the supreme court of the State of Utah, this 19th day of January, A. D. 1899.

G. W. BARTCH,
Chief Justice of the Supreme Court of the State of Utah.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

Attest: LILBURN P. PALMER,
Clerk Supreme Court of Utah.

A copy of the foregoing citation was served on us this 19th day of January, A. D. 1899.

G. F. PUTNAM,
RAY VAN COTT,
W. T. GUNTER,
Attorneys for Stephen H. Lynch, Treas., etc., Defendant in Error.

Filed Jan. 20, 1899.

LILBURN P. PALMER,
Clerk Supreme Court Utah.

38 In the Supreme Court of the State of Utah.

THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff in Error,
vs.
STEPHEN H. LYNCH, Treasurer of Salt Lake County and Collector of Taxes Therein, Defendant in Error.

Know all men by these presents that we, The Union Refrigerator Transit Company, a corporation, as principal, and W. W. Riter and —— ——, of the city and county of Salt Lake, in the State of Utah, are held and firmly bound unto the above-named Stephen H. Lynch, treasurer of Salt Lake county, the defendant in error, in the sum of five hundred dollars, to be paid to the said Stephen H. Lynch,

treasurer as aforesaid; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of January, in the year of our Lord eighteen hundred and ninety-nine.

Whereas the above-named The Union Refrigerator Transit Company, a corporation, has sued out a writ of error from the Supreme Court of the United States to the supreme court of the State of Utah to reverse the judgment of the said supreme court of the State of Utah in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named The Union Refrigerator Transit Company shall
39 prosecute said writ of error to effect and answer all damages and costs if it fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

THE UNION REFRIGERATOR TRANSIT CO.,
By P. L. WILLIAMS, *Its Att'y.*
W. W. RITER.

Signed, sealed, and delivered in presence of—
CHAS. D. SAVERY.

Approved.
G. W. BARTCH,
Chief Justice Supreme Court of Utah.

(Copy.)

40 In the Supreme Court of the United States.

In the Matter of the Petition of THE UNION REFRIGERATOR TRANSIT COMPANY, a Corporation, for a Writ of Error to the Supreme Court of the State of Utah.

Assignment of Errors.

Now comes the said Union Refrigerator Transit Company, a corporation, the petitioner for a writ of error to the supreme court of the State of Utah, by Percy Werner and P. L. Williams, its attorneys, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. The said supreme court of the State of Utah erred in holding that the cars of the said company mentioned and described in the complaint in said cause had a situs within the State of Utah for the purposes of taxation under the laws of said State.

Second. The said court erred in holding and deciding that the tax mentioned and set forth in the complaint in said cause and therein shown to have been imposed upon the said cars of the said Union Refrigerator Transit Company was not a regulation of interstate commerce, and in holding that the said tax upon said cars was

valid and not in violation of the provision of the Constitution of the United States vesting in the Congress of the United States the exclusive power to regulate commerce among the several States, to wit, subdivision 3 of section 8 of article I of said Constitution.

41 Third. The said supreme court of the State of Utah erred in holding and deciding that the provisions of the statute of the State of Utah under which the said tax was attempted to be imposed upon the said cars of the said company, as set forth in the said complaint, authorized the imposition of the said tax.

Wherefore the said Union Refrigerator Transit Company, the petitioner and plaintiff in error, prays that the said judgment and decision of the supreme court of the said State of Utah be reversed, and that justice be done in the premises.

PERCY WERNER,
P. L. WILLIAMS,
Attorneys for said Plaintiff in Error.

Filed Jan. 20, 1899.

LILBURN P. PALMER,
Clerk Supreme Court Utah.

42 UNITED STATES OF AMERICA.

STATE OF UTAH, *County of Salt Lake,* } ss:

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, in pursuance of a writ of error allowed in the cause wherein The Union Refrigerator Transit Company, a corporation, is plaintiff in error and Stephen H. Lynch, treasurer of Salt Lake county and collector of taxes therein, is defendant in error, do return hereto attached a full, true, and correct transcript of the record herein, together with a copy of the order of submission, judgment, and bond and the original petition for writ of error, writ of error, citation, and assignment of errors, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record is a full, true, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, State of Utah, Jan. 4, 1896.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of the State of Utah this 20th day of January, A. D. 1899.

LILBURN P. PALMER,
Clerk Supreme Court Utah.

Endorsed on cover: File No., 17,293. Utah supreme court. Term No., 207. The Union Refrigerator Transit Company, plaintiff in error, *vs.* Stephen H. Lynch, treasurer of Salt Lake county & collector of taxes therein. Filed February 16th, 1899.

No. 207.

943 S.C

FILED
DEC 4 1899
JAMES H. McKENNEY,
Clerk

Brief of Werner & Williams for C

IN THE

Supreme Court of the United States.

Filed Dec. 4, 1899.

OCTOBER TERM, 1899.

THE UNION REFRIGERATOR TRANSIT COMPANY,
Plaintiff in Error,

vs.

STEPHEN H. LYNCH, TREASURER OF SALT LAKE COUNTY,
Defendant in Error.

No. 207.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

PERCY WERNER,
Attorney for Plaintiff in Error.
PARLEY L. WILLIAMS,
Of Counsel.

CENTRAL LAW JOURNAL CO., ST. LOUIS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNION REFRIGERATOR TRANSIT COMPANY,
Plaintiff in Error,

vs.

STEPHEN H. LYNCH, Treasurer of Salt Lake County,
Defendant in Error.

No. 207.

In Error to the Supreme Court of the State of Utah.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

The State Board of Equalization of the State of Utah, in August, 1897, assessed and valued, of the property of the plaintiff in error, ten cars of the aggregate assessment of $2,600, and apportioned this assessment to the several counties in the State traversed by lines of railway over which cars of plaintiff in error might have passed. To the County of Salt Lake $210 of this assessment was apportioned, upon which taxes for State, school, county and city taxes were levied to the amount of $5.76. Plaintiff in error, to avoid seizure and sale of its property,

paid the tax under protest, and instituted this suit in the District Court of the County of Salt Lake against the county treasurer and collector of taxes to recover back the amount so paid.

The case was heard on demurrer to plaintiff's petition, based on the ground that the complaint did not state facts sufficient to constitute a cause of action. The District Court sustained the demurrer, and plaintiff elected to stand by its complaint, and from a judgment in favor of defendant entered on the 21st day of May, 1898, appealed to the Supreme Court of the State of Utah, to the September Term, 1898, thereof, which court, in an opinion filed December 10th, 1898, affirmed the judgment of the lower court, and the case is here on a writ of error from that judgment.

Inasmuch as the sole question submitted and decided by the courts of Utah was as to whether the complaint filed stated facts sufficient to constitute a cause of action, and that is the only question brought here for review, we will set out the complaint in full.

District Court, Third Judicial District, State of Utah, County of Salt Lake.

The Union Refrigerator Transit Company, a corporation,
Plaintiff,
v.
Stephen H. Lynch, Treasurer of Salt Lake County and Collector of Taxes therein,
Defendant.

The plaintiff complains of the above named defendant and alleges:

That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

That its principal office and place of business is in the city of Louisville, in said State, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States, and of soliciting shipments for such cars and giving to the said cars needful attention at various points in transit; that the said cars are and were during the said time the sole property of the plaintiff, and are not and were not during any of the said time allotted, leased, rented, or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are and were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars chose to route them in shipping.

The plaintiff further alleges that the business in which said cars, including the cars hereinbefore mentioned, are and were during the said times engaged in, was exclusively interstate commerce business, being confined to interchange and transportation of perishable products of the various parts of the United States from points in some of said States to points in others of the said States; that plaintiff has not now and has not had any office or place of business within the State of Utah, and that all

freight transported in plaintiff's cars in or through the State of Utah, including the cars hereinafter mentioned, was transported in said cars either from a point or points in a State of the United States outside of the State of Utah to a point or points within the State of Utah, or from a point or points within the State of Utah to a point or points without the State of Utah, or between points neither of which were within the said State of Utah, and that said cars were within said State of Utah at no regular intervals nor in any regular number, and when in said State of Utah were only within it in transit, except to load or unload freight shipped from within out of said State or coming into said State from without the same, or in the transportation of freight entirely through or across said State, and at such times the said cars were only transiently present for the said purposes and not otherwise.

And plaintiff further alleges that said cars do not and did not abide, nor have they at any time had any *situs* within the said State of Utah, nor has this plaintiff, nor has it heretofore at any time had other property of any description whatsoever located within the State of Utah.

And plaintiff alleges that its cars so used as hereinbefore stated, and not otherwise, are not subject to tax within the said State for any purpose whatsoever.

That, notwithstanding the aforesaid facts, the State Board of Equalization of the State of Utah unlawfully and wrongfully, on the 14th day of August, 1897, assessed and valued, of the property of the plaintiff, ten cars, of the aggregate assessment of $2,600, for all purposes of county and State tax-

ation, for the year 1897, and thereafter wrongfully and unlawfully apprortioned the said assessment to the several counties in the said State of Utah, through which lines of railway pass and over which the said cars *might* pass or be transported; that among the counties to which said apportionment was made was the County of Salt Lake, and there was by the said board apportioned to said County of Salt Lake of the said assessment the sum of $210.

That the taxes levied upon the said property so assessed and apportioned to Salt Lake County for State, State school, county, city and city school taxes amounted to the sum of $5.76; that the said tax was and is by reason of the aforesaid facts illegal and void.

That the plaintiff, to avoid the seizure and sale of its property, and to prevent incurring the penalties provided by law, did on the 18th day of November, 1897, pay the said taxes under protest to the said defendant, who was then and still is the duly elected, qualified and acting treasurer of said Salt Lake County, and, by virtue of the said office, the duly authorized and legally constituted collector of all of the said taxes.

That at the time of the payment of the said sum of money so demanded for said tax the plaintiff duly notified the said defendant, as such collector, of the grounds of its claim that the said tax was illegal; that the same was for that reason paid under protest, and that suit would be brought against him to recover the same; that the said protest was made in writing and before the payment of the said sum of money. A copy of the said protest so made and delivered to said defendant at said time is hereto at-

tached, marked Exhibit "A," and made a part of this complaint.

Wherefore the said plaintiff prays judgment against the said defendant, as such treasurer and collector, for the said sum of $5.76 and interest thereon, as provided by law, and also for its costs herein.

P. L. WILLIAMS,
Attorney for Plaintiff.

EXHIBIT "A."

Salt Lake City, Utah, Nov. 18, 1897.

Stephen H. Lynch, County Treasurer, Salt Lake County, and Collector of Taxes.

Sir: You are hereby notified that the State Board of Equalization of the State of Utah assessed for taxation in said State for the year 1897 ten cars of the Union Refrigerator Transit Company, a corporation of the State of Kentucky; that the said ten cars were assessed at $260 each, making a total assessment in the aggregate of the cars of said company within the State of Utah of $2,600, and that the said board apportioned the said assessment of $2,600 on said cars among the several counties in said State through which the lines of railway pass, over which it is claimed said cars of said refrigerator company were used during said year; that in and by such apportionment the said Board of Equalization of said State apportioned to Salt Lake County of said total assessment on said cars of said company the sum of $210, and that the tax levied on said assessment for said State, State school, county, city and city school taxes in said Salt Lake City and County aggregate the sum of $5.76.

You are further notified that the said Board of Equalization of said State made the said assessment and apportionment against said property without authority of law, and that the same is illegal and void on the ground that said company, the owner of said cars, is a non-resident of the State of Utah, has no office or place of business within the State; that its business is owning and letting refrigerator cars to shippers for the transportation of perishable merchandise in interstate commerce only; that its cars never come into the State of Utah except at irregular intervals and carrying such interstate commerce and freight, and for no other purpose than for the transportation of such freight, and the cars are only in the State in transit and have no actual or other *situs* within the said State, and are not subject to taxation by law within said State.

That the whole of the said taxes so assessed and levied upon the property of the said company within said city and county are, by reason of the facts aforesaid, illegal and void, and the said company now protests against the payment of the said sum on the ground that the same is illegal and void, and it submits to pay the same only to prevent the seizure and sale of its property and to avoid being subjected to the penalties provided by law; and you are hereby notified that said railroad company will bring suit against you to recover the said sum of $5.76, so illegally levied as a tax upon its said property and paid, together with interest thereon and the costs of suit.

UNION REFRIGERATOR COMPANY,
By P. L. WILLIAMS,
Its Attorney and Agent.

Specification of Error.

1. The Supreme Court of the State of Utah erred in holding that the cars of the plaintiff in error mentioned and described in the complaint had a *situs* within the State of Utah for the purposes of taxation.

2. The said court erred in holding and deciding that the tax mentioned and set forth in the complaint and therein shown to have been imposed upon the said cars of plaintiff in error, was not a regulation of interstate commerce, and in holding that the tax upon said cars was valid and not in violation of the provision of the Constitution of the United States vesting in the Congress of the United States the exclusive power to regulate commerce among the several States, to-wit: Subdivision 3 of Sec. 8 of Art. I. of said constitution.

3. The said court erred in holding and deciding that the provisions of the statute of the State of Utah under which said tax was attempted to be imposed upon the said cars of plaintiff in error, as set forth in said complaint, authorized the imposition of the said tax.

POINTS.

I.

The cars of plaintiff in error, under the admitted facts set forth in the complaint, acquired no *situs* in the State of Utah, for the purposes of taxation.

Crandall v. Nevada, 6 Wall. 35.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18.

American Ref. Transit Co. v. Hall, 174 U. S. 70.
State *ex rel.* Armour Packing Co. v. Stephens, 146 Mo. 662.
Cent. R. R. v. State Board, 49 N. J. L. 11.
Bain v. Railroad, 105 N. C. 363.
Robinson v. Longley, 18 Nev. 71.

II.

A tax upon vehicles which are employed exclusively in connection with interstate commerce, imposed by the authorities of a State where such vehicles have no *situs*, is invalid and void as violative of the interstate commerce clause of the Federal Constitution.

Fargo v. Michigan, 121 U. S. 230.
Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326, 346.
Brown v. Maryland, 12 Wheat. 449.
State v. Engle, 34 N. J. L. 425.
State *ex rel.* Armour Packing Co. v. Stephens, 146 Mo. 662.

ARGUMENT.

This case follows close along the lines of Pullman Palace Car Co. v. Pennsylvania (141 U. S. 18), and American Refrigerator Transit Company v. Hall (174 U. S. 70), but is clearly distinguishable from both in this, that in both of these cases it appeared that the cars of owners complaining of taxes imposed were *habitually used* in the States wherein the taxes which were resisted were imposed. In the Pullman case the cars were furnished to railroad companies

under contracts entered into between the car owner and the railroad companies, and "were continuously and permanently employed in going to and fro upon certain routes of travel." In the Refrigerator Transit Co.'s case it was admitted that that company had an *average number* of cars, to-wit: forty, which were used within the State of Colorado during the year for which the taxes in question were imposed; and this court in the concluding paragraph of its opinion in the latter case reaffirms its decision in the Pullman case, saying: "The tax may be fixed by an appraisement and valuation of the average amount of the property *thus habitually* used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation (*in*)valid." (174 U. S. 70, 82.)

The following are the facts, admitted by the demurrer to the complaint in this case, with reference to the ownership, location and use of the cars which were assessed and taxed, for the recovery back of the taxes paid on which this proceeding was instituted, viz:

"That plaintiff in error is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky; that its principal office and place of business is in the city of Louisville, in said State; that it was engaged exclusively in the business of *furnishing to shippers* refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States; that the said cars are and were, during the taxing period in question, the sole property of the plaintiff, and were not, during any of

the said time, allotted, leased, rented, or furnished under contract to any railroad company or companies, or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular train, nor at any specified or agreed time, but were run *indiscriminately* over the lines of railroad over which *consignors* of freight shipped in such cars *chose to route them* in shipping; that the business in which said cars were engaged was *exclusively interstate commerce business*, being confined to interchange and transportation of perishable products of the various parts of the United States, from points in some of said States to points in others of the said States; that plaintiff had not any office or place of business within the State of Utah, and that said cars were within said State of Utah at no regular intervals, nor in any regular number, and when in said State of Utah were only within it in transit; and that said cars did not abide, nor have they at any time had any *situs* within the said State of Utah."

The situation of these cars were, therefore, precisely that of the cars involved in the case of Fargo v. Michigan (121 U. S. 230), as to which the statement of facts in that case discloses:

"Third. That during the said year the said transportation company was possessed of certain freight cars, which were used and run by the railroad companies in whose possession they chanced from time to time to be for the transportation, upon their own and connecting lines of railroad, of through freight, principally between the city of New York, in the State of New York, and Boston, in the State of

Massachusetts, and Chicago, in the State of Illinois, and other points and commercial centers in the west, northwest and southwest, without the State of Michigan; that said cars were not used for the carriage of freight between points situate within the said State of Michigan, but wholly for the transportation of freight, either passing through the State, or originating at points without said State and destined to points within, or originating at points within said State and destined to points without."

In the Fargo case the tax was on the gross receipts derived from the use of the cars involved, instead of on the cars themselves, as here; but this is a distinction without a difference, so far as the questions here presented are concerned. As said by Justic Miller: "To hold that a tax on freight is within it (*i. e., the commerce* clause of the constitution), and that on gross receipts arising from such transportation is not, is 'to keep the word of promise to the ear and break it to the hope.'" (15 Wall 292.) Where property is used exclusively as an instrumentality of interstate commerce, the tax, of course, becomes a burden on that commerce, whether directed against the property or the use. (See Brown v. Maryland, 12 Wheat. 449; Passenger Cases, 7 How. 458.)

The opinion of the Supreme Court of Utah upholding the tax in question here is, we say, and with all respect, more specious than sound. It may be reduced to the following propositions:

1st. A nation within whose territory any personal property is actually, though but temporarily and transiently, situate, has an entire dominion over

it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.

2d. The cars of plaintiff in error came within the borders of this State, temporarily and transiently.

3d. Therefore, they fell under the dominion of, and within the jurisdiction of, this State, and were subject to taxation.

Thus is the question of *situs* disposed of. The question as to the interference with interstate commerce is then easily disposed of by reference to repeated decisions of this court, that the *mere fact that property is employed in interstate commerce does not exempt it from State taxation.*

The last proposition is doubtless true; but is it true that property which is brought into a State temporarily, and is within its borders only transiently, acquires a *situs* in the State for the purpose of taxation? Is it literally true, and is it to be understood to be the law of the land that, as this court has said in the Pullman case, *supra*:

"The State, having the right, for the purpose of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which, *at a given moment* (!), were within its borders"—irrespective of the character of the use of the cars in the State? It certainly was not necessary to lay down so extreme a proposition in that case—where, admittedly, a hundred cars were *habitually* and *continuously* used along definite routes of travel, under contract with the owner, within the State. Yet, the Supreme Court of Utah follows this as a literal precept of the law. If it be so, we say, with-

out fear, that it is utterly subversive of the doctrines recognized and applied by the courts of this country from the foundation of this Government; and, moreover, that the logical consequences of this doctrine are so appalling that no lover of this country's form of government can do aught but shudder when he contemplates them. It involves a revolution. It means that no citizen of one State may permit any of his property to pass beyond the boundaries of his State without subjecting it to the liability of being pounced on and destroyed by each of the sovereign States through whose territory he may venture to allow it to pass. The union of our several States would exist only in name.

We are convinced that this doctrine is as unsound as it is shocking, and that its adoption by the Supreme Court of Utah arises from a confusion of the powers of an *absolute sovereign*, with those of one of the States of our Union. True, an absolute sovereign may tax or destroy whatever it finds "at a given moment" within its borders. Yet a State of the American Union is not an absolute sovereign. The right to absolute sovereignty was surrendered by the adoption of the Federal Constitution. *Apparently* the Supreme Court of Utah recognizes this, though really it does not. It says: "*The power to tax being inherent in the Government, the State unquestionably has the right through the legislature to exercise that power over all property which may be found within its borders,* WHETHER BROUGHT THERE TEMPORARILY OR OTHERWISE, *for the purpose of business or for trade or convenience,* UNLESS RESTRAINED OR LIMITED BY CONSTITUTIONAL PROVISION, and courts cannot control the exercise of such power,

except when it conflicts with constitutional provisions." (Transcript, p. 10.) *Really* the court recognizes no constitutional restriction.

It is fallacious to contend that each one of our States may tax whatever it protects. This is not true. The property of the citizens of each State is immune from taxation in every other State into which it finds its way in the course of, and while still in the stream of, interstate commerce. This is the consideration for the abdication by each State of its sovereignty over such property, and for its protection whilst within the borders of the State. Each State affords like protection without taxation to the property of the citizens of other States similarly used.

Take the simple case of Longley v. Robinson, *supra*. In this case the Supreme Court of Nevada held that a traveling circus and menagerie, owned by a non-resident, and brought into the State to be exhibited at various places and then taken into and through other States for the same purpose, was not subject to taxation in that State. The court said, in passing upon the question: "The property was not accessible in the State. In the sense of the statute for the purpose of taxation it was not within the State. It was passing through the State at the time of the assessment. It was here temporarily in the ordinary course of business. When he came here plaintiff intended to remain in the State but a few days and then to continue his journey to other places in a neighboring State. He intended to take away all the property he brought with him. He was actually 'on the wing,' passing from one State to another. As well might his property have been

taxed if for the purpose of rest or health plaintiff had stopped a few days in Washoe County. As well might a resident of another State be taxed on his money and team, if he comes on a visit to the State to remain a week."

This decision is in harmony with the unbroken current of authorities. And wherein does this Nevada case differ from the case at bar? In the Nevada case the menagerie was transported on cars and exhibited along the lines of railroads, and today no traveling circus but has its specially constructed railway cars,—scarcely any large theatrical or operatic troupe but has its private baggage cars for scenery and costumes. These have but followed the lead of shippers of oil, of perishable freight, of live stock, of poultry and furniture, who have found it expedient to use a style of car different from that ordinarily furnished by railway companies for freight shipments. Not all shippers are able, as are the Standard Oil Co. and the Armour Packing Co., to own railroad cars, and hence companies like plaintiff in error, who supply the smaller shippers with a style of cars which the railroad companies find it out of their power, or at least, unremunerative, to supply. Has the law changed with this evolution in the carrying trade? Shall the *goods* in the cars and the *freight charges* be exempt from taxation, and the *cars* themselves be liable to seizure and distraint in every county of every State through which they happen to pass on journeys of interstate commerce? And if the cars belonging to shippers and to private car owners supplying shippers be taxable wherever they happen temporarily to stray, shall not those belonging

to owners who also operate railroads be subject to the same rule of law?

These are serious questions, and could scarcely have been asked soberly a few years ago, before the seemingly outermost limits of the power of the State to tax the instrumentalities of interstate commerce were reached by this court in the Pullman and Express Co. tax cases. An anxious profession, who are the aids of this court in the ministration of justice, are watching and waiting to know whether it be true, as has been announced by the Supreme Court of Utah in this case, that a State may, without inquiry, tax whatever it finds transiently and temporarily at any given moment within its borders.

In view of the numerous late decisions of this court which have compelled this court to consider and apply all the earlier decisions of this court bearing upon the questions presented in this case, it would be burdening this court unnecessarily to review in this brief all those cases, and we will content ourselves with a brief notice of the last case, that of American Refrigerator Transit Co. v. Hall (174 U. S. 70). This court says of that case: "In the case before us we do not need to go far in search of the principles which determine it. We think they may be found in the cases of Western Union Tel. Co. v. Massachusetts, 125 U. S. 530; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, and Adam's Express Co. v. Ohio, 165 U. S. 194."

In the telegraph and express tax cases the property taxed was actually and permanently located in the taxing State. The question was not whether the property was taxable, but how it should be valued—as separate and independent, or as part of a

system extending through other States. In the Pullman case it was held that property owned in other States and not technically fixed or located in the taxing State, might become merged in the mass of taxable property in the latter by regular and constant use therein in unvarying quantities, over definite routes of travel, under express contract for such use.

How far beyond these cases this court has gone in the Refrigerator Transit Co. case is not quite clear. Apparently the only distinction between that case and the Pullman case which this court found, was in the fact of the *varying* number of cars used in the State, in the Pullman case the number being fixed and constant; for this court says (174 U. S. p. 82): "The *only* question is whether it was competent to ascertain the number of the cars to be subjected to taxation by inquiring into the *average number* used within the State limits during the period for which the assessment was made." And continuing this court says: "It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property thus used and employed, its fair share of the burdens of taxation imposed upon similar property *used in like way by its own citizens*, we think that such a tax may be properly assessed and collected in cases like the present, whether specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valu-

ation of the *average amount of the property thus habitually used and employed.*"

The Supreme Court of Utah admittedly finds itself opposed to two very respectable courts of last resort in this country, as it says (see opinion p. 12 of Transcript): "*There have been cited, however, on this same point, the cases of Central R. R. Co. v. State Board of Assessors*, 49 *N. J. L.* 1, *and Bain v. Railroad*, 105 *N. C.* 363, *and these it must be admitted support the contention of the appellant, and some of the cases above distinguished as therein cited as authority. We do not think those decisions are in harmony with the weight of authority, and they are clearly opposed to the latest decisions of the Supreme Court of the United States upon this subject, as appears from the cases of The Pullman Car Co. v. Pennsylvania*, 141 *U. S.* 18; *Adams Express Co. v. Ohio*, 165 *U. S.* 194, *and Adams Express Co. v. Ohio*, 136 *U. S.* 185."

We invite this court's especial attention to the New Jersey and North Carolina cases here pronounced to be in conflict with the late cases of this court. The cases are unusually well considered cases, and the decisions are based entirely upon the decisions of this court.

In the case at bar it appears that certain of the cars of the plaintiff in error passed, at irregular intervals, and strictly as instrumentalities of interstate commerce, through the State of Utah; that the cars were furnished to shippers of perishable freight, and not leased, rented, or furnished under any contract to any railroad company; it is admitted that plaintiff in error never had any office or property within the State of Utah, and that its

cars were never in the State, except transiently, and obtained no *situs* there. It further appears that the State Board of Equalization arbitrarily assessed to plaintiff in error ten cars, and fixed the value of the cars at $260 each, and apportioned the assessment for taxation between the several counties in the State through which the cars MIGHT pass over railroads traversing them.

We have here, then, an extreme case—no definite number of cars confined to a single run, under contract with the railroad company, as in the Pullman case, and no *average number throughout the year*, as in the Refrigerator Transit Co. case. It does not even appear that the cars of plaintiff in error were *habitually* used in the State of Utah, but that the cars were furnished to shippers of perishable freight, and their getting into the State would entirely depend upon the accident of choice of the shipper in routing the cars. For aught that appears, one or more of those cars might have been within the State once, or oftener, during a year, or it may happen that none of the cars will be within the State within any specified year, and in another year they may, in a particular limited season, pass through the State in considerable numbers—but always transiently, and never abiding within the State, or having a *situs* therein, or becoming commingled with the general mass of the property within its borders.

If, now, the State of Utah is an absolute sovereignty, and has the exclusive right to say what gives personal property a *situs* within the State for the purposes of taxation, and may say that a vehicle of interstate commerce belonging to a non-

resident owner, and passing through the State on a special journey between two distant points in the union, acquires a *situs* by virtue of such transient presence within the State, then Congress has not only not the exclusive right to regulate interstate commerce, but is really powerless in the premises.

It is useless to discuss here the question of the effect of the tax as an interference with interstate commerce. The tax, of course, imposes a burden on the commerce, and if the tax is illegal, its imposition constitutes an interference with such commerce. This will not be denied. The question as to the *situs* of this property, and the question as to the imposition of the tax constituting an interference with interstate commerce, are not two questions, but one question. Grant the *situs*, the right to tax exists, independent of the use of the property. It thus follows that this question of the *situs* of property, taxed because within the borders of a State, involves the questions of the taking of property without due process of law, and the imposition of burdens upon interstate commerce, and is thus peculiarly a federal question.

It is settled that interstate commerce may not be taxed in the several States as such, either its privileges, rights, or proceeds. It is likewise settled that property is not exempt from taxation in the several States *merely* because of its relation to interstate commerce. We contend that transient property, which enters a State only to pass through it, either as the subject or the instrument of interstate commerce, can never, under the Federal Constitution, be reached by the taxing power of the State. And we contend that if a single car makes a single,

continuous and transient trip across the territory of a State, and thereby acquires no *situs* in the State, the fact that two or more cars may make such trips, or that one car may make two or more such trips, does not give such car or cars a *situs* within the State.

All of which is respectfully submitted.

PERCY WERNER,
Attorney for Plaintiff in Error.

PARLEY L. WILLIAMS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 207.

THE UNION REFRIGERATOR TRANSIT COMPANY,
PLAINTIFF IN ERROR,

vs.

STEPHEN H. LYNCH, TREASURER OF SALT LAKE COUNTY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UATH.

BRIEF OF DEFENDANT IN ERROR.

Plaintiff in error urges two points for the reversal of this case. These we will consider separately. The first contention is that the cars of the plaintiff in error under the admitted facts of the complaint acquired no situs in Utah for purposes of taxation. As to this we answer that it has been settled by repeated decisions of this court that, to use the language of Mr. Justice Shiras, in American Refrigerator Transit Co. v. Hall, 174 U. S., page 82:

> "Where a corporation of one state brings into another to use and employ a portion of its movable personal property, it is legitimate for the latter to impose upon such property thus used and employed, its fair share of the burdens of taxation imposed upon the same property used in a like way by its own citizens. We think that such a tax may be

> assessed and collected in cases like the present, where the specific and individual items of property so employed were not continuously the same but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

Other authorities to the same effect are:

Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 18.

Marye vs. Baltimore & Ohio R. R. Co., 127 U. S. 117.

Adams Express Co. vs. Ohio, 165 U. S. 194.

Adams Express Co. vs. Ohio, 166 U. S. 185.

Western Union Telegraph Co. vs. Massachusetts, 125 U. S. 530.

Pullman Palace Car Co. vs. Board of Assessors, 55 Federal Reporter, 206.

We contend that the facts of this case bring it squarely within the rule above announced.

But counsel for plaintiff in error attempt to distinguish this case from Pullman Palace Car Company vs. Pennsylvania, and American Refrigerator Transit Company vs. Hall, *supra*, on the ground that the cars held taxable in these cases were habitually used in the states where the taxes were imposed. It is not perceived that the extent or frequency with which the plaintiff in error runs its cars into a state solely determines their situs for taxation there, nor that it is necessary, in order to make them subject to taxation, that it should have been in the habit habit of running a given number of them every day, or so many times a week or month. If plaintiff in error, in the usual course of business, is in the habit of running its cars into Utah whenever the needs of the business call them

there, in other words, whenever they are routed by shippers into and through that state, as is clearly shown by the complaint in this case to be the fact, we take it that some cars belonging to it, the average number used the year round in Utah are "habitually used and employed" in that state within the doctrine of the Pullman case and the American Refrigerator case, *supra*. The facts that Utah is less populous than Colorado and that a less number of refrigerator cars are needed to carry perishable freight to her markets or from her producers to markets outside the state, or that a less quantity of such freight is transported through that state than through Colorado, or that the business of plaintiff in error for any one of a variety of reasons may be less extensive in Utah than was the business of the American Refrigerator Company in Colorado, do not change the principle involved. If it is a part of plaintiff's business to employ and use its cars in and through Utah and this is done whenever occasion exists and there is a demand for them there, then whether the average number employed be four hundred, or forty, or only four, that number are properly taxable in the state.

If we have correctly apprehended the principle laid down by this court in the authorities above referred to, it is not the number of cars used or the number of trips they make in and through a state that is the test of their liability to taxation therein. It is the fact that the property of a corporation such as an Express Co., or Sleeping Car or Refrigerator Car Co. whose business extends through a number of states may be properly valued for taxation as a unit, taking into consideration not only its tangible property but also the uses of that property, the extent of the business, and all other elements going to make up the aggregate value of the plant as a whole and that a just portion of such tax may properly be exacted by each state

through which the business extends, and in which a part of it is transacted and a portion of the corporate property used and employed, for the reason that the corporate property, considered as a unit, derives value from the use of it in each of such states and its business is protected and conserved by their laws.

Adams Express Co. vs. Ohio, 165 U. S., page 220-221.

Same case, 166 U. S. pp. 223-224.

American Refrigerator Transit Co. vs. Hall, 174 U. S 70.

The complaint shows that the plaintiff in error was doing business in Utah during 1897, the year for which the tax in question was levied, and that it was running its cars into and through the state, using and employing them there for profit, evidently in the same manner as in other states. The facts alleged in the complaint as to the ownership, control, and method of use and management of the cars of plaintiff in error in Utah are identical with those set forth with respect to the cars of the American Refrigerator Co. in Colorado, in 174 U. S. *supra.*

The complaint further shows that on August 14, 1897, the State Board of Equalization of Utah assessed and valued of the property of the plaintiff in error, ten cars of the aggregate value of $2600 for all purposes of county and state taxation for the year 1897, and thereafter "apportioned the said assessment to the several counties in the State of Utah through which lines of railway pass and over which the said cars might pass or be transported;" and that $210 of said assessment was apportioned to Salt Lake County. No objection is urged or complaint made that this assessment is unreasonable or unjust in respect either to the amount of property or the valuation

placed thereon; neither is the method of apportionment objected to. It must then be assumed, that if the cars of plaintiff in error are subject to taxation in Utah at all, the amount of the tax in the case at bar furnishes no just ground of complaint. This court has already decided, as above stated, that in cases where the specific and individual items of property used and employed were not continuously the same but were constantly changing according to the exigencies of the business, the tax may be fixed by an appraisement and valuation of the average amount of the property which is habitually used and employed.

American Refrigerator Transit Co. vs. Hall, *supra.*

In the case at bar, the cars of the appellant were constantly changing but, on the average, there were some cars in Utah continuously throughout the year. Plaintiff in error has not complained that too many cars were assessed or that they were assessd too much, but simply complains that it cannot be taxed at all. It is not necessary that a definite number must be in the state continuously; it is sufficient that, on an average, the assessed value is there.

Let us take an illustration; suppose plaintiff in error had one thousand cars come into Utah in February, stay three days and go out; suppose five hundred of these cars come into the state in July, stay four days and go out; suppose six hundred cars come into the state in November, stay ten days and go out; it is apparent that on the average, plaintiff has had a certain number of cars in the State of Utah continuously for the year, taking the whole number of cars as a basis. Now the average number in the State of Utah is presumed to have a situs there under the cases heretofore cited and the principles therein stated. The actual number that have a situs there continuously,

under the foregoing principles should be taxed and contribute their proportionate amount to the protection that all property receives in the state. In the words of Chief Justice Fuller in Adams Express Co. vs. Ohio, 165 U. S. on page 220:

> "Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government."

We further urge that, it being a well settled principle that public officers are presumed to do their duty and that official action will be taken to be correct and regular where nothing appears to the contrary, it is a just inference from the pleadings here that the number of cars assessed by the State Board of Equalization, to-wit: ten, was the average number used and employed by the plaintiff in error in the State of Utah during the year 1897. It is nowhere alleged that any other or incorrect basis of assessment was adopted. It cannot be disputed that the one above set forth is correct. We submit that this is a case where the presumption is plainly applicable.

How, then, can this case be distinguished from American Refrigerator Co. vs. Hall, *supra?* There the cars were owned, used, managed, and controlled in precisely the same way as here. There, as here, it was a part of the car company's business, out of which it made a profit, to use and employ its cars for carrying freight in and through the state. There, as here, the individual cars used were not continuously the same but were constantly changing as the needs of the business and the convenience of the company and its patrons required. And there, as here, there

were on an average, constantly in the state a given number of cars of the car company. And in that case this court held that such average number were lawfully taxable by the state.

Counsel for plaintiff in error asks whether cars are taxable wherever they happen temporarily to stray and whether the rule for which we contend, applies also to car owners who also operate railroads. We answer that cars are not taxable wherever they happen to stray temporarily but that, where a foreign corporation does business and employs a portion of its personal property, whether it be cars, engines, or what not, continuously in a state, that property is taxable there. And this is true whether the corporation be the owner of a stage line, a sleeping car or refrigerator car line, or a railroad.

Plaintiff in error cites Fargo vs. Michigan, 121 U. S. 230, contending that the situation of the cars here in question is the same as that of the cars which were part of the property of the Transportation Company in that case. That case is sufficiently distinguished by the fact stated in counsel's brief, that the tax there was levied upon gross receipts and not upon property; and thus falls within the rule announced by Chief Justice Fuller in Adams Express Co. vs. Ohio, 165 U. S. on page 220:

> "Although the transportation of the subjects of interstate commerce or of *receipts* received therefrom or the occupation or business of carrying it on, cannot be directly subject to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction if it is essentially only property taxation, it will not be considered as falling within the inhibition of the constitution."

It may further be noted that, in the foregoing case, the complainants bill showed:

> "Fourth, that the said Transportation Company during the said year was not running or interested in any special, fast, through or other stock, coal, or refrigerator car freight line, or doing business in, or running cars over any of the railroads in said State of Michigan otherwise than as in the preceding paragraphs stated."

The plaintiff in error also cites Crandall vs. Nevada, 6 Wallace, 35. In this case, however, the tax was held unconstitutional because levied on each person passing through or leaving the State of Nevada. In Robinson vs. Longley, 18 Nevada, 71, a circus was brought into Nevada and the court in the opinion finds that it came from another state with the intention of passing from Nevada into another state, which it actually did, and the court holds that the case is identical with one where a person simply travels through one state on his way into another. The property was only temporarily and transiently in Nevada for a brief period "on the wing."

If Robinson had divided up his circus and kept half of it in Nevada for a year exhibiting it, or if he had had one-half of it in the state for half the year and then sent it out and brought the other half in and kept it there the remainder of the year, we submit that he would have been properly taxable by Nevada upon the value of one-half of his circus.

Here, while individual items of plaintiff's property were in Utah only for brief periods of time, yet a portion of its property considered as a whole, a fraction of it, was in the state throughout the year.

Robinson vs. Longley as also Central R. R. vs. State Board, 49 N. J. Law 11, and Bain vs. Railroad, 105 N. C. 363, which are opposed to Pullman Palace Car Co. vs. Pensylvania and American Refrigerator Co. vs. Hall, *supra*, were cited to this court by counsel for plaintiff in error in

the latter case. Philadelphia S. S. Co. vs. Pennsylvania, 122 U. S. 326, is distinguishable for the same reasons as Fargo vs. Michigan, *supra*. The case of Brown vs. Maryland, 12 Wheaton 449 concerned a license tax upon the business of importing and is obviously not in point.

The case of State vs. Stephens, 146 Missouri, 662 is also relied on by the plaintiff in error. The portion of the opinion of Judge Marshall containing views sustaining plaintiff's contention, is not concurred in by the remainder of the court. On the contrary, five out of the seven judges place their concurrence in the judgment expressly upon another ground. State vs. Engle, 34 N. J. Law 425, is also readily distinguishable as the property there attempted to be taxed was only in the state temporarily and in transit.

As to the second assignment of error, counsel for plaintiff concedes that the fact that its property is engaged in interstate commerce does not exempt it from state taxation and that if the cars taxed had a situs in Utah for purposes of taxation, then the tax is not an interference with inter-state commerce.

The third assignment of error challenges the sufficiency of the statutes of Utah, to authorize the imposition of the tax. While this point has not been adverted to in the brief for plaintiff in error, and might therefore be assumed to be waived, we will briefly discuss it.

It was contended for plaintiff in error in the court below that the laws of Utah contemplate that only such property shall be taxed as is connected with a railroad line or such property as is owned or controlled and operated by a railroad company which owns or uses a railroad line and that, where cars are operated and used in interstate commerce even though they are within the State of Utah a considerable portion of the time, that the legislative lan-

guage is not apt to tax such property because the same is not connected with and used by the company that operates and controls the railroad line, meaning by line the realty that is necessary to operate a line of railroad as distinguished from the rolling stock.

The Constitution of Utah, Article XIII, Section 2, Revised Statutes of Utah, page 61, provides, in substance, that all property in the State, not exempt, shall be taxed in proportion to its value, that value to be ascertained as provided by law. And Section 10 of the same article, Revised Statutes of Utah, page 63 provides:

> "All corporations or persons in this state, or doing business herein, shall be subject to taxation for State, County, School, municipal or other purposes on the real or personal property owned or *used* by them within the territorial limits of the authority levying the tax."

No question was made, nor could well have been made, but that this language isnot only adequate but apt to impose a tax upon plaintiff's property but it was contended that the language of the legislature was not apt for this purpose. The law of Utah, in force at the time this tax was levied, is found in the Laws of 1896, page 423, Section 1, pages 439-40, Section 55-56. Section One provides, in substance, the same as the constitution so that here the language is both apt and adequate.

Turning to Section 55 it will be noticed:

1st.—That all that is provided by this section is the manner of ascertaining the property to be taxed and that, for this purpose, certain officers of certain companies are designated as the ones that shall furnish to the State Board of Equalization a sworn statement as to the property and the value of the property owned and controlled by their

respective companies, as a basis of valuation. It will be noticed that, in this section, no tax is imposed nor is any authority given to impose any tax, but the whole section is directed to one single point, that of conveniently ascertaining what property shall be assessed and made the subject of taxation. Counsel for plaintiff in error made the point in the lower court that there is no punctuation between the words "street railway" and "car". But very little attention is ever given to punctuation in interpreting the law. On this point we site, Sutherland on Statutory Construction, Section 232. There is no doubt but that there should be a comma between "street railway" and "car" and, read in this way, we should have "railroad line", "street railway line", "car line", etc. But it was contended that this means a physical line, a line having a physical unity, such as the realty that composes the line of railway between two points. We do not think the Legislature intended any such narrow construction as this. A car line may be a great number of cars that are operated by a car company as a car line and yet the actual realty over which the rolling stock is run may not be owned by such company. It would be a very narrow and restricted construction to say that "car line" means that there is to be a physical unity instead of a unity of use and management. The Legislature meant that any car line is to furnish this record that has either a physical unity or a unity of use and management. And there is no question but that the line of plaintiff in error has a unity of use and management.

This meaning of the Legislature is made very clear by the concluding clause of Section 55, to-wit:

> "Any officer of a railroad, street railway, telegraph, or telephone line, railway depot, or car company, failing, on de-

> mand, to furnish the statement required of him shall be subjected to the penalty."

The court will notice from this quotation that it includes officers of *car companies*. The Legislature is referring to the identical thing that is mentioned in the first part of Section 55 and here it is, any car company that fails to furnish the statement is subject to the penalty. There is no question but that the appellant is a car company and there can be no doubt under this section that it is one of the companies required to furnish a sworn statement. It is to be presumed that the appellant obeyed the law and that it furnished a sworn statement as provided by law, of the number of its cars that came into the state, and obeyed the law in other respects.

Passing from Section 55, which deals merely with the statement that is to be furnished, we come to Section 56, and this is the section that provides for the assessment of the property so that even if Section 55 were to be eliminated, it would still leave in full force Section 56, as Section 55 is a mere convenience which Section 56 contains the *power* to assess. In this section it is provided:

> "At such meetings the board must assess all property and franchises of railroads, car, street railway, railway depot, and telephone and telegraph companies, but franchises derived from the United States must not be assessed.

From this language it will be seen that all "car" companies are to be assessed by the board. There cannot be a doubt that but plaintiff in error is a car company. The language of this section does not restrict or purport to restrict the assessment to domestic corporations; it includes both foreign and domestic corporations. It does not seem to us possible, without great verbiage, for a Legislature to express itself more clearly as to what shall be

assessed than is done in Section 56 which says, in so many words, that all property and franchises of *car companies* are to be assessed. This exact question under a similar statute in Colorado was decided adversely to the contention of plaintiff in error, in American Refrigerator Transit Co. vs. Hall, *supra;* reported in the court below in 51 Pacific Reporter, 421. With respect to exemptions from taxation, the law is well settled that:

> "Every such immunity must receive a strict construction. Legislation which is claimed to relieve any species of property from its due proportion of the general burdens of government, should be so clear that there can be no reasonable doubt or controversy about its terms. The language must be such as leaves no room for discussion. Doubts must be resolved against the exemption."
>
> Sutherland on Statutory Construction, Section 364.

The case of Marye vs. Baltimore & Ohio R. R. Co., 127 U. S. 117, was cited by plaintiff in error. That case is not in point for the reason that the court states that the language used and other expressions contained in the law taken as a whole show that it was intended to apply to domestic corporations only, and to no others. Taking the general language of the Utah Constitution and of the law, we submit that it was clearly intended to apply to every person, company, and corporation owning or using property in the state.

It is respectfully submitted that the judgment of the Supreme Court of Utah was right and should be affirmed.

JOSEPH L. RAWLINS,
Attorney for defendant in Error.

CHARLES S. VARIAN,
Of Counsel.

UNION REFRIGERATOR TRANSIT COMPANY *v.* LYNCH.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 207. Argued March 21, 1900.—Decided April 9, 1900.

Cars of the Union Refrigerator Transit Company, a corporation of Kentucky, engaged in furnishing to shippers refrigerator cars for the transportation of perishable freight, and which were employed in the State of Utah for that purpose, were subject to taxation by that State.

THE Union Refrigerator Transit Company filed its bill in the District Court in and for Salt Lake County, State of Utah, against Stephen H. Lynch, treasurer of Salt Lake County and collector of taxes therein, alleging: "That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky; that its principal office and place of business is in the city of Louisville, in said State, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States and of soliciting shipments for such cars and giving to the said cars needful attention at various points in transit; that the said cars are and were during the said times the sole property of the plaintiff, and are not and were not during any of the said time allotted,

leased, rented or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are and were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them in shipping.

"The plaintiff further alleges that the business in which said cars, including the cars hereinbefore mentioned, are and were during the said times engaged in was exclusively interstate commerce business, being confined to interchange and transportation of perishable products of the various parts of the United States from points in some of said States to points in others of the said States; that plaintiff has not now and has not had any office or place of business within the State of Utah, and that all freight transported in plaintiff's cars in or through the State of Utah, including the cars hereinafter mentioned, was transported in said cars either from a point or points in a State of the United States outside of the State of Utah to a point or points within the State of Utah, or from a point or points within the State of Utah to a point or points without the State of Utah, or between points neither of which were within the State of Utah; and that said cars were within the said State of Utah at no regular intervals nor in any regular number, and when in said State of Utah were only within it in transit, except to load or unload freight shipped from within out of said State or coming into said State from without the same or in the transportation of freight entirely through or across said State, and at such times the said cars were only transiently present for the said purposes and not otherwise.

"And plaintiff further alleges that said cars do not and did not abide, nor have they at any time had any *situs* within the said State of Utah, nor has this plaintiff, nor has it heretofore at any time had other property of any description whatsoever located within the State of Utah.

"And plaintiff alleges that its cars so used as hereinbefore stated, and not otherwise, are not subject to tax within the said State for any purpose whatsoever.

"That, notwithstanding the aforesaid facts, the state board of equalization of the State of Utah unlawfully and wrongfully on the 14th day of August, 1897, assessed and valued, of the property of the plaintiff, ten cars of the aggregate assessment of $2600, for all purposes of county and state taxation for the year 1897, and thereafter wrongfully and unlawfully apportioned the said assessment to the several counties in the said State of Utah through which lines of railway pass and over which the said cars might pass or be transported; that among the counties to which said apportionment was made was the county of Salt Lake, and there was by the said board apportioned to said county of Salt Lake of the said assessment the sum of $210.00.

"That the taxes levied upon the said property so assessed and apportioned to Salt Lake County for state, state school, county, city and city school taxes amounted to the sum of $5.76; that the said tax was and is by reason of the aforesaid facts illegal and void."

Plaintiff then averred the payment of the tax, under written protest, claiming the tax to be illegal, in order to avoid the seizure and sale of its property and to prevent incurring the penalties provided by law, and prayed judgment for the sum of $5.76 and interest, and for costs. Defendant filed a general demurrer to the complaint, which was sustained, and, plaintiff electing not to amend but to stand on its complaint, judgment of dismissal with costs was entered. The cause was then taken to the Supreme Court of Utah and the judgment affirmed. 18 Utah, 378. Thereupon this writ of error was allowed by the Chief Justice of that court.

Mr. Percy Werner for plaintiff in error. *Mr. Parley L. Williams* was on his brief.

Mr. Joseph L. Rawlins for defendant in error. *Mr. Charles S. Varian* was on his brief.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The constitution of the State of Utah provided that: "All

property in the State, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law;" and that: "All corporations or persons in this State, or doing business herein, shall be subject to taxation for state, county, school, municipal or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." Constitution, Art. 13, §§ 2, 10.

Some question was raised in the Supreme Court of Utah as to the proper construction and scope of the state statutes in respect of taxation, but the court held that by those laws all property, owned or used by railway, car, telephone, telegraph and other companies, within the territorial limits of the State, was subjected to taxation according to its value regardless of the domicil of its owner.

The contention on this writ of error is that the taxation of the ten cars of plaintiff in error was forbidden by the Constitution of the United States because they had no *situs* for that purpose in the State of Utah, and the tax imposed a burden on interstate commerce.

In *American Refrigerator Transit Company* v. *Hall*, 174 U. S. 70, quotations were made from the opinions in *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U. S. 530; *Adams Express Company* v. *Ohio*, 165 U. S. 194, and *Adams Express Company* v. *Ohio*, 166 U. S. 185, and the conclusion of the court was thus expressed: "It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such

cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid."

The case before us involves the taxation by the State of Utah of certain cars belonging to a corporation of Kentucky; the case cited involved the taxation by the State of Colorado of certain cars belonging to a corporation of Illinois; and if this case comes within the rule laid down in that case, nothing further need be said.

In that case the facts were stipulated; and it appeared that the American Refrigerator Transit Company was a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis in said State; that it was engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars were the sole and exclusive property of the plaintiff, and that the plaintiff furnished the same to be run indiscriminately over any lines of railroad over which shippers on said railroads might desire to route them in shipping, and furnished the same for the transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; and plaintiff had not and never had had any contract of any kind whatsoever by which its cars were leased or allotted to or by which it agreed to furnish its cars to any railroad company operating within the State of Colorado; that it had and had had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points of the United States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in

such business aforesaid, and then only transiently present in said State for such purposes.

All these matters were set up, *mutatis mutandis*, in the complaint in this case in substantially the same language employed in setting forth the facts in that case. But it was also there stipulated: "That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of $250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said State for the purposes of taxation."

The complaint in this case contained no averment as to the average number of cars of plaintiff in error used in the State of Utah, but it did show that the company was doing business in Utah in the year for which the tax in question was levied, and that it was running its cars into and through the State, using, employing and caring for them there for profit, in the same manner as the cars in that case, and it was not alleged that the assessment by the state board of equalization was unreasonable, or unjust, or in excess of the valuation of other like property for taxation, or that the method of apportionment was erroneous. The presumption is that the action of the taxing officers was correct and regular, and that the number of cars assessed by the state board of equalization was the average number used and employed by plaintiff in error in the State of Utah during 1897.

The objection is not that too many cars were assessed, or that they were assessed too much, or in an improper manner, even if we could consider such questions, but simply that they could not be taxed at all. And this objection was considered and overruled in the case to which we have referred.

Judgment affirmed.

MR. JUSTICE WHITE did not hear the argument and took no part in the consideration and disposition of this case.